

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**TINA MILLER, on behalf of
TYRIK MILLER,
Plaintiff**

v.

**JO ANNE BARNHART,
Commissioner of Social Security,
Defendant**

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**CIVIL ACTION
NO. 03-2024**

MEMORANDUM OPINION AND ORDER

RUFÉ, J.

February 4, 2004

Plaintiff seeks judicial review of the decision of the Commissioner of the Social Security Administration denying her son's claim for Supplemental Security Income ("SSI") under Title XVI of the Social Security Act. 42 U.S.C. §§ 1381-1383h. Presently before the Court are the parties' cross-motions for summary judgment. United States Magistrate Judge Jacob P. Hart issued a report recommending that this Court deny Plaintiff's Motion for Summary Judgment, grant Defendant's Motion, and affirm the Commissioner's decision. Upon careful and independent consideration of the administrative record, Judge Hart's report, and Plaintiff's objections thereto, the Court overrules Plaintiff's objections and grants Defendant's Motion for Summary Judgment.

I. PROCEDURAL HISTORY

Plaintiff Tina Miller filed an application on behalf of her son, Tyrik Miller, for SSI on March 9, 2001, alleging that Tyrik has been disabled since December 2, 2000 due to a combination of Attention Deficit Hyperactivity Disorder ("ADHD"), Oppositional Defiance Disorder ("ODD"), headaches, a learning disorder, and a depressive disorder. The Pennsylvania Bureau of Disability Determinations ("BDD") denied Plaintiff's claim for SSI, and Plaintiff thereafter

requested a hearing. R. 26-30. After a hearing before Administrative Law Judge (“ALJ”) J. Joseph Herring on August 15, 2002, the ALJ denied Plaintiff’s claim on September 18, 2002. R. 12-22. The Appeals Council denied Plaintiff’s request for review on January 29, 2003. R. 3-4. Plaintiff then appealed to this Court.

On cross-motions for summary judgment, Judge Hart filed a Report and Recommendation (“R & R”), finding that the ALJ’s decision was supported by substantial evidence and recommending that Defendant’s Motion for Summary Judgment be granted. R & R at 20. The Court, however, is troubled by noted inaccuracies in the record below. Nevertheless, after careful review of the entire record, the Court adopts Judge Hart’s conclusions. Consistent with its duty as articulated in 28 U.S.C. § 636(b)(1), the Court addresses below those portions of the R & R to which Plaintiff objects.

II. FACTUAL BACKGROUND

Tyrik Miller was born on August 16, 1990. During the time period relevant to this matter, he was evaluated by various medical professionals for problems he was having in school. He was also evaluated by his elementary school principal and his fifth grade teacher. Some of these evaluations were completed specifically to assist in determining Tyrik’s disability claim, while others were to treat Tyrik for his problems at school or for headache pain. Because one of Plaintiff’s contentions is that the ALJ improperly relied on some of these evaluations while discounting others, each evaluation is summarized below.

A. The Psycho-Educational Evaluation

In December 2000, Tyrik was failing all of his subjects at St. Rose of Lima, the parochial school where he attended fifth grade. R. 113. Accordingly, Tyrik’s teacher, Ida Jones, and

his mother referred Tyrik to Nancy DeHaven, Ed.M. and Dale F. Cleary, Ph.D., for a psycho-educational evaluation R. 113. Drs. DeHaven and Cleary met with Tyrik and observed him in a classroom setting, interviewed Ms. Jones, reviewed Tyrik's school records, and administered a number of tests, including the Wechsler Intelligence Scale for Children, the Developmental Test of Visual-Motor Integration, the Rey Complex Figure Test and Recognition Trial, a test of word reading efficiency, and a test of reading comprehension. R. 115. They also evaluated Tyrik's social emotional functioning "through a clinical interview, the Children's Self-Report and Projective Inventory, the Conners' Rating Scales and the ADHD Rating Scale – IV." R. 119.

In their report, Drs. DeHaven and Cleary noted the following:

(1) Tyrik has "Average cognitive abilities with no significant difference between his Verbal and Performance IQ's." R. 116.

(2) One of Tyrik's strengths is "his ability to form abstract verbal concepts and to focus his attention when discrete problem solving steps are utilized." R. 117.

(3) Tyrik performed in the average or below average range on tests of his visual-motor integration, memory and ability to organize complex visual information. R. 117-18. Drs. DeHaven and Cleary concluded: "Results of the perceptual testing indicate that Tyrik performs below average when asked to remember and organize complex visual information. He has difficulty discriminating between important and unimportant information." R. 118.

(4) Tyrik performed poorly on the reading comprehension tests. R. 119.

(5) Tyrik's mother reported that Tyrik "is restless and impulsive and that he has difficulty sitting." Id. Tyrik's teacher, Ms. Jones, reported that Tyrik "makes careless mistakes in his schoolwork, fidgets and is easily distracted." Id. Drs. DeHaven and Cleary concluded, however,

that “Ms. Jones’ rating of [Tyrik’s] classroom behavior, while indicating some attentional problems, was significantly below the threshold for a prediction of [ADHD].” R. 119-20.

(6) “Tyrik readily engaged in the evaluation process and demonstrated a clear commitment to performing well. Tyrik’s motivation, perseverance and good behavior despite his educational difficulties, reflects positively on St. Rose of Lima’s educational staff, his parents and on Tyrik himself. It was a pleasure to work with such a delightful and charming child.” R. 120.

(7) Tyrik is “a learning disabled child with a specific reading disability.” R. 121. After making a number of recommendations of ways to help Tyrik learn more effectively, the doctors recommended that Tyrik be evaluated by a developmental physician specializing in ADHD if his “distractibility, restlessness and disorganization” did not improve. R. 122.

B. Treatment Related to ADHD

Tyrik received treatment for ADHD at the Haddington Health Clinic (“Haddington”) on several occasions between April and October 2001. Pursuant to his examination of Tyrik and review of Tyrik’s psychological evaluation, Dr. Louis J. Casale diagnosed Tyrik with ADHD and prescribed Ritalin. R. 141. The record contains, however, only a short handwritten note in which Dr. Casale wrote that “[t]he diagnosis of [ADHD] seems quite appropriate,” as well as a patient evaluation form bearing an illegible signature dated April 5, 2001 that is essentially blank except for a scribble that appears to say “diagnosis of ADHD.” R. 141, 149.¹ On June 12, 2001, Tyrik’s

¹ The signatures on the patient evaluation forms from the Haddington Clinic are virtually illegible, and the Court was unable to find a specific reference to the physicians’ names elsewhere in the record. The Court can only assume that the April 5, 2001 evaluation form [R. 149] was prepared by Dr. Casale because his handwritten note [R. 141] bears the same date. Although this lack of clarification in the record distresses the Court, it is uncontested that Tyrik was treated by a Haddington doctor on the dates listed on the forms, and that the forms contain the treating physicians’ notes about his or her examination. Accordingly, the Court considered these evaluations for the purposes of this Memorandum Opinion.

treating physician noted that Tyrik was “doing well on Ritalin.” R. 148. On October 4, 2001, Tyrik’s treating physician noted that Tyrik’s ADHD was “controlled.” R. 147.

C. The Teacher/Counselor Questionnaire Completed by Ms. Jones

On April 5, 2001, the same day Dr. Casale diagnosed Tyrik with ADHD, Tyrik’s teacher, Ms. Jones, completed a teacher/counselor questionnaire. R. 86-89. She commented that Tyrik is cooperative but struggles with written directions, that he tries hard to pay attention but is “sometimes easily distracted,” that he tries hard to do work but is hindered by a reading problem, and that he always tries to complete his assignments but often needs help. R. 87.

D. The Report of the Medical Advisor for the BDD

On May 16, 2001, a medical advisor for the BDD performed a disability evaluation of Tyrik. R. 134-39. On his evaluation form, he listed three impairments for Tyrik: (1) ADHD; (2) ODD; and (3) Depressive Disorder. The advisor found that all three diagnoses were appropriate and that the combination of these three impairments was severe, but did not meet, medically equal, or functionally equal listing level severity. R. 134. In his report, he noted that Ms. Jones had indicated that since Tyrik had begun taking Ritalin, he was quieter, not as hyperactive, took things more seriously, settled down to work, and had better concentration. R. 136.

E. The Child Functioning Questionnaire Completed by Sister Eileen

On June 17, 2002, Sister Eileen Gillespie, the principal of Tyrik’s school, completed a child functioning questionnaire² that instructed her to rate Tyrik’s functioning by comparing him

² On this questionnaire, Sister Eileen rated Tyrik’s functioning in a variety of tasks within each domain using the following rating scale:

Never (None) or Rarely

Sometimes (“moderate”) means that in comparison to same-aged unimpaired

to an unimpaired child of the same age. R. 102. In the domain of acquiring and using information, Sister Eileen rated Tyrik at the “marked” difficulty level in eleven of the fifteen categories and the “moderate” difficulty level in the remaining four categories. R. 103. In the domain of attending and completing tasks, she reported that Tyrik has “extreme” difficulty maintaining focus, following through on instructions, concentrating without adult supervision, and keeping pace with other children, and that he has “marked” difficulty in eleven of the remaining thirteen categories. R. 105. In the domains of interacting and relating, caring for oneself, moving about and manipulating objects, and caring for health and well-being, she reported that Tyrik rarely has difficulty. R. 104, 106-08.

F. Treatment for Migraine Headaches

Tyrik also received treatment for migraine headaches. R. 175-79. His mother testified that these headaches occurred as frequently as twice a week, and that they occasionally caused Tyrik to vomit. R. 114, 178. Dr. Anna Poduri of Children’s Hospital of Philadelphia treated Tyrik for these migraines, which she described as classic ocular migraines with a preheadache aura. R. 177. She did not prescribe any medication, however, because Excedrin Migraine usually worked to relieve Tyrik’s pain. R. 175.

children, this child functions like the average child in this area, with occasional difficulties in some of the activities.

Often (“marked”) means that in comparison to same-aged unimpaired children, this child’s functioning is seriously affected in one or more of the activities listed.

Always (“extreme”) means that in comparison to same-aged unimpaired children, this child’s functioning is very seriously affected.

R. 103.

G. Dr. Rogers-Lomax's Expert Testimony

Dr. A. Faye Rogers-Lomax, D.O., testified as a medical expert at the hearing before the ALJ. R. 208-19. Dr. Rogers-Lomax reviewed Tyrik's file but did not personally evaluate or treat Tyrik. R. 209. Based on her review of the file, she testified that Tyrik had been appropriately diagnosed with a reading disability, migraine headaches and ADHD. R. 210-11. She also testified that "there is some severe limitation specifically related to the child's learning disability." R. 211. She found, however, that the learning disability does not meet or equal the severity of an impairment in the Listing of Impairments found in 20 C.F.R. Part 404, Subpart P, Appendix 1, because the only evidence supporting such a determination is Sister Eileen's assessment, which is inconsistent with other evidence in the record. R. 211-12. As evidence of this inconsistency, she pointed to a reading report for Tyrik's sixth grade year that showed improvement in all of the areas marked. R. 185, 211-12. The bottom of this report contains a note stating, "Tyrik is always a pleasure to work with. He excels [sic] in comprehension but needs help in word recognition. . . ." R. 185. According to Dr. Rogers-Lomax, this notation contradicts evidence that Tyrik reads but does not comprehend. R. 212.

Dr. Rogers-Lomax also testified regarding Tyrik's functioning as it relates to the domains of functioning listed in the Social Security regulations, 20 C.F.R. § 416.926a. R. 213. She stated that if she were to credit Sister Eileen's assessment, her opinion would be that Tyrik has a marked limitation in the domain of acquiring and using information, but that without Sister Eileen's assessment, Tyrik's limitation is less than marked. R. 213-14. In the domain of attending to and completing tasks, she testified that Tyrik's limitation is less than marked, in part because Tyrik has remained on the same low dosage of Ritalin for his ADHD. R. 214-16. Dr. Rogers-Lomax also testified that Tyrik has less than marked limitations in the domains of health and physical well-being

and caring for himself, and no limitation in the domains of interacting and relating to others and moving about and manipulating objects. R. 214-17.

III. THE ALJ'S DECISION

The ALJ utilized the three-step test set out in the Social Security Regulations for determining disability in children. 20 C.F.R. § 416.924. First, he found that Tyrik has not engaged in substantial gainful activity. R. 22; 20 C.F.R. § 416.924(b). Second, he found that Tyrik's headaches and learning disorder in reading are severe impairments, but that his ADHD is not severe. R. 22; 20 C.F.R. § 416.924(c). The ALJ then found that Tyrik's impairments neither meet nor equal the severity of an impairment in the Listing of Impairments found in 20 C.F.R. Part 404, Subpart P, Appendix 1. R. 22; 20 C.F.R. § 416.924.

The ALJ also found that Tyrik's impairments are not functionally equivalent to a listed impairment. R. 21-22. To determine functional equivalence, the following standards apply:

Where a child does not meet the listing criteria, his impairment can be found to be *functionally equivalent* to a listed impairment where it causes "marked limitations in two broad areas of functioning or extreme limitations in one such area." 20 C.F.R. § 416.925(b)(2) and .926a(b)(2). A limitation is "marked" when it "seriously interferes with the child's ability to function independently, appropriately and effectively." 20 C.F.R. § 416.925(b)(2). An extreme limitation means one where a child's test scores are three standard deviations or more below the norm, or where the child has no "meaningful functioning in a given area." 20 C.F.R. § 416.926a(c)(3)(ii). The areas of function, referred to as the "domains" are: acquiring and using information; attending and completing tasks; interacting and relating with others; moving about and manipulating objects; caring for yourself; and health and physical well-being. 20 C.F.R. § 416.926a(b)(1)(i)-(vi).

R & R at 3. Upon reviewing Tyrik's limitations in light of these domains, the ALJ found that Tyrik has: 1) no extreme limitations; 2) a marked limitation in the domain of acquiring and using

information; 3) less than marked limitations in the domains of attending and completing tasks, caring for yourself, and health and physical well-being; and 4) no limitations in the domains of interacting and relating to others and moving about and manipulating objects. Accordingly, the ALJ found that Tyrik's impairments are not functionally equivalent to a listed impairment and that therefore, Tyrik is not disabled.

IV. STANDARD OF REVIEW

The Social Security Act provides for judicial review of any "final decision of the Commissioner of Social Security" in a disability proceeding. 42 U.S.C. § 405(g). The district court may enter a judgment "affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing." *Id.* However, the Commissioner's findings "as to any fact, if supported by substantial evidence, shall be conclusive." *Id.* Accordingly, the Court's scope of review is "limited to determining whether the Commissioner applied the correct legal standards and whether the record, as a whole, contains substantial evidence to support the Commissioner's findings of fact." Schwartz v. Halter, 134 F. Supp. 2d 640, 647 (E.D. Pa. 2001).

Substantial evidence has been defined as "more than a mere scintilla" but somewhat less than a preponderance of the evidence, or "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971); Jesurum v. Sec'y of the United States Dep't of Health & Human Servs., 48 F.3d 114, 117 (3d Cir. 1995). The standard is "deferential and includes deference to inferences drawn from the facts if they, in turn, are supported by substantial evidence." Schaudeck v. Comm'r of S.S.A., 181 F.3d 429, 431 (3d Cir. 1999).

In reviewing Magistrate Judge Hart's R & R, this Court must review *de novo* only

“those portions” of the R & R “to which objection is made.” 28 U.S.C. § 636(b)(1).

V. OBJECTIONS TO THE R & R

Plaintiff objects to Magistrate Judge Hart’s R & R on the general ground that “the ALJ failed to apply the regulations regarding assessment of the interactive and cumulative effect of impairments and improperly discounted the current assessments of Tyrik’s functioning.” To this end, Plaintiff raises two specific objections. First, Plaintiff argues that the ALJ improperly based his findings on evidence that antedated Tyrik’s application for SSI. Second, Plaintiff argues that the ALJ’s decision was not supported by substantial evidence because “the ALJ failed to explain how he had weighed the evidence confirming that despite medication and extra support from adults Tyrik’s impairments seriously interfere with his functioning in the domain of attending and completing tasks.” Objections at 2. The Court addresses these objections below.

A. Whether the ALJ improperly based his findings on evidence that antedated Tyrik’s application for SSI

Plaintiff argues that the ALJ and Judge Hart improperly relied on Tyrik’s psycho-educational evaluation from December 2000 and Ms. Jones’s report from April 2001 instead of the more contemporaneous assessment from Sister Eileen in June 2002. *Id.* To support this objection, Plaintiff argues that because Tyrik’s application for SSI was submitted in March 2001, he cannot be found disabled prior to that date. This statement is simply incorrect. Although Tyrik’s application was not filed until March 2001, on that application Tyrik’s mother indicated that the onset of Tyrik’s disability was December 2, 2000, within four months of the filing date. R. 45. The Court knows of no rule that restricts evidence of an alleged disability prior to the date the application was filed. Further, Plaintiff herself cites to the psycho-educational evaluation in her Motion for Summary

Judgment. Plaintiff's Brief at 6-7. Therefore, the ALJ was justified in considering the psycho-educational evaluation and Ms. Jones' assessment (which was completed after the application was filed) when making his determination.

B. Whether the ALJ properly weighed the evidence in finding that Tyrik has a less than marked limitation in the domain of attending to and completing tasks

Plaintiff contends that Tyrik has a marked limitation in the domain of attending to and completing tasks and argues that "[n]either the ALJ nor the Magistrate Judge appears to have considered that the combined effect of Tyrik's other impairments, or their cumulative and interactive effect, imposes marked limitations" in this domain. Objections at 3. The opinion of the ALJ and the R & R do not support this conclusion.

In advancing this argument, Plaintiff relies on Dr. Casale's diagnosis of ADHD, the BDD examiner's report, and Sister Eileen's assessment. None of these pieces of evidence, however, are entitled to great weight. The only evidence of Dr. Casale's diagnosis is a handwritten note that says, in its entirety: "I examined Tyrik Miller today and reviewed his recent psychological evaluation. The diagnosis of Attention Deficit Hyperactivity Disorder (ADHD) seems quite appropriate. I started him on a Ritalin 10 mg bid today and will follow up." R. 141. As Judge Hart stated: "An ALJ may choose to reject evidence as 'not probative [when] the doctor's opinion [is] not supported by relevant clinical or laboratory diagnostic findings.'" R & R at 5, quoting Serody v. Chater, 901 F. Supp. 925, 929 (E.D. Pa. 1995). Although Dr. Casale asserts in his note that he reviewed Tyrik's recent psychological evaluation, it is unclear what evaluation he is referring to, and the evaluation does not appear to be included in the record. Moreover, there is no evidence that Dr. Casale made any clinical or laboratory findings of his own before concluding that Tyrik has ADHD.

Accordingly, the ALJ was not required to give Dr. Casale's diagnosis much weight.

Nevertheless, the ALJ accepted Dr. Casale's diagnosis; he merely found that Tyrik's ADHD was not severe. This finding is consistent with all of the evidence. The psycho-educational evaluation from December 2000 stated that Tyrik's behavior was far below what is necessary for a diagnosis of ADHD. The BDD examiner's report is consistent with the ALJ's finding as well. The BDD examiner merely checked a box in a form indicating that the combination of Tyrik's impairments, including ADHD, ODD and depressive disorder, are severe, but do not meet or functionally equal the listings. R. 134. The reports of Tyrik's treating physicians also concur with the ALJ's finding. On June 12, 2001, Tyrik's treating physician noted that Tyrik was "doing well on Ritalin," and on October 4, 2001, his treating physician noted, "ADHD controlled." R. 147-48. Accordingly, as Judge Hart stated, "the ALJ properly considered the diagnosis of ADHD and found that it was not a severe impairment, one which imposes more than minimal functional limitations, 20 C.F.R. 416.924(c). Here, there is conflicting evidence whether Tyrik even suffers from ADHD, and even if he does, his treating physicians conclude that it is well controlled by Ritalin." R & R at 7.

Sister Eileen's assessment is entitled to even less weight. Although Dr. Rogers-Lomax admitted that if she were to credit Sister Eileen's assessment, her opinion would be that Tyrik is disabled, she questioned Sister Eileen's report because it conflicts with most of the other evidence. In his R & R, Judge Hart points out numerous examples of how Sister Eileen's assessment conflicts with Ms. Jones' report and with other evidence in the record. R & R at 7-9. Further, Sister Eileen is the principal of Tyrik's school, and as such, it is not clear on this record what amount of classroom contact Sister Eileen had with Tyrik. On the other hand, it is logical and certainly reasonable for the

ALJ to credit Ms. Jones' report because she taught Tyrik for seven months, five days a week, 6 ½ hours a day. R. 88. Accordingly, the ALJ properly considered Sister Eileen's assessment.

Based on the foregoing discussion, the Court finds that the ALJ's decision is supported by substantial evidence.³

An appropriate Order follows.

³ The Court notes that if the record contained additional credible evidence consistent with Sister Eileen's report relating to a further deterioration in Tyrik's functioning in the domain of attending to and completing tasks, the Court may have come to a different conclusion. However, Sister Eileen's report is the only piece of evidence supporting a conclusion that Tyrik's condition is worsening. As the balance of the evidence demonstrates either that Tyrik's functioning has remained the same or has improved with treatment, the Court finds that the ALJ's decision that Tyrik is not disabled is supported by substantial evidence.

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**CIVIL ACTION
NO. 03-2024**

ORDER

AND NOW, this 4th day of February, 2004, upon careful consideration of Plaintiff's Motion for Summary Judgment [Doc. #10], Defendant's Motion for Summary Judgment [Doc. #12], the Report and Recommendation of United States Magistrate Judge Jacob P. Hart [Doc. #14], and Plaintiff's Objections thereto [Doc. #15], and for the reasons set forth in the attached Memorandum Opinion, it is hereby **ORDERED**:

1. The Report and Recommendation is **APPROVED** and **ADOPTED**;
2. Plaintiff's Objections are **OVERRULED**;
3. Plaintiff's Motion for Summary Judgment is **DENIED**;
4. Defendant's Motion for Summary Judgment is **GRANTED**; and
5. The Clerk of Court shall mark this case **CLOSED** for administrative purposes.

It is so **ORDERED**.

BY THE COURT:

CYNTHIA M. RUFÉ, J.